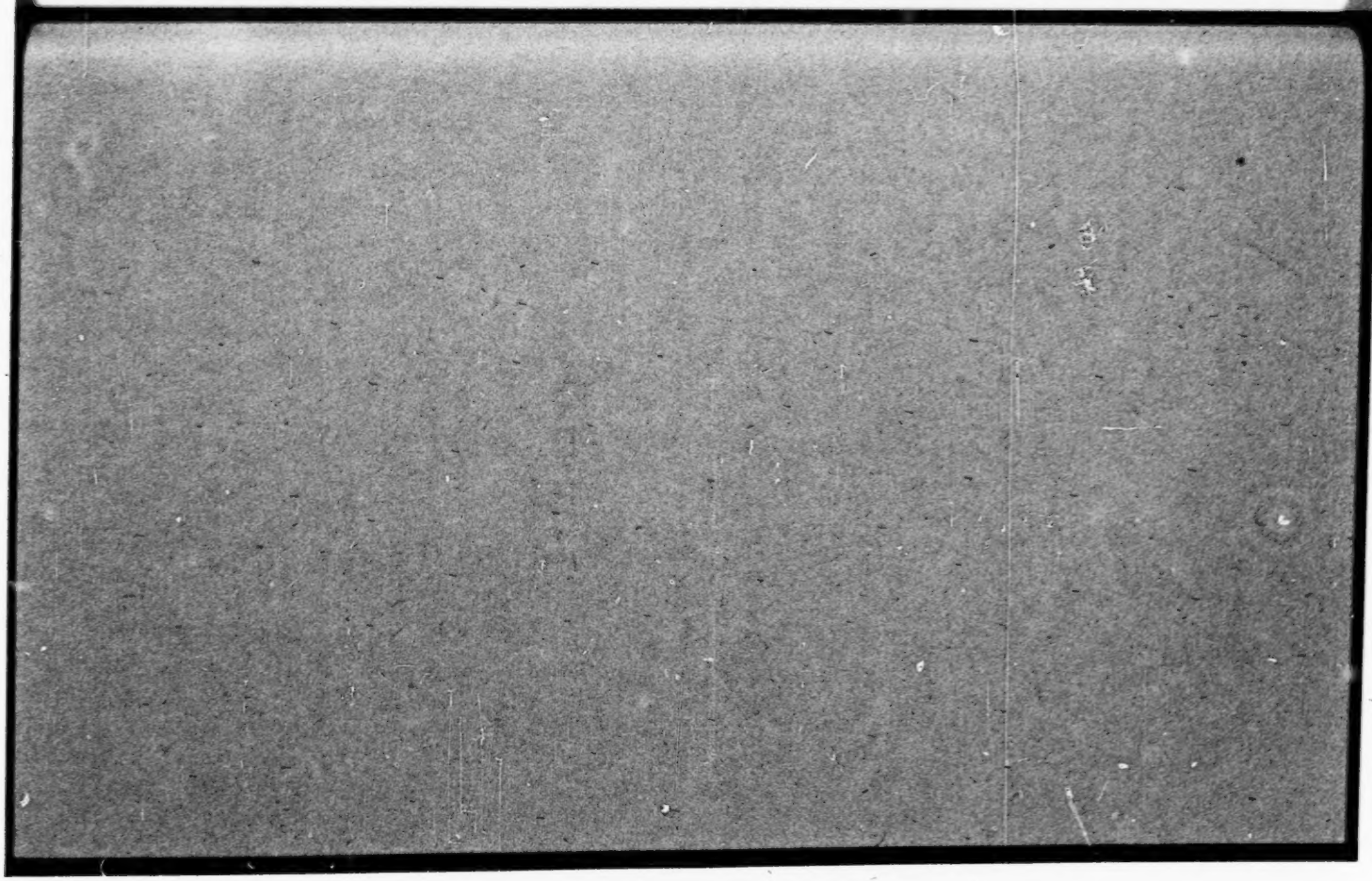

Order and Opinion of the Court of Appeals Dated August 14, 1974

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-2168

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

RICHMOND POWER & LIGHT OF THE CITY OF RICHMOND, INDIANA
INDIANA & MICHIGAN MUNICIPAL DISTRIBUTORS ASSOCIATION
ANDERSON POWER & LIGHT OF THE CITY OF ANDERSON, INDIANA, *Intervenors*

On Petitions for Rehearing

Filed 14 August 1974

Before: BAZELON, *Chief Judge*, ROBINSON and WILKEY, *Circuit Judges*

ORDER

On consideration of the petitions for rehearing, it is

ORDERED by the Court that the petitions for rehearing are granted and the opinion filed on 14 February 1974 is

modified in the manner set out in the third paragraph of the opinion of this Court filed herein this date.

Per Curiam

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: The Commission, with the support of intervenors, has filed a petition for rehearing in which it requests that we modify our main opinion of 14 February 1974 by eliminating therefrom our holdings: (1) that the Commission's five-month suspension of the rates filed by Indiana & Michigan Electric Co. (I&M) must be vacated; and (2) that I&M is entitled to collect from its customers the difference between its filed rates, which now must be deemed lawful from their effective date, and the rates actually charged for the six-month period from 14 July 1972 to 13 January 1973.

In our main opinion we explained in Parts III and IV why under section 205 of the Federal Power Act the Commission does not have authority to suspend filed rates after a proper proposed effective date, a conclusion with which both majority and dissenting members of the Commission agreed. Since we have held that the effective date was 14 July 1972, the Commission suspension order of 11 August 1972 could have had no effect. It has been forcefully argued to us that, while this is statutorily correct, yet great inequities are likely to result. Even though the Commission is statutorily powerless to correct these inequities, we are urged to exercise our equity powers as a court to mitigate these hardships, or at least place the Commission in such posture as to be able to do so on the basis of evidence and findings later to be heard and made on the justness and reasonableness of I&M rates.

After scrutinizing the various memoranda submitted in connection with this petition,[1] we have decided to adhere to our holding that the Commission exceeded its authority when it suspended I&M's rates for five months. However, we deem it appropriate to exercise our equity powers and modify our earlier order in the following manner:

1. I&M may not collect retroactive rate increases for the five-month period from the effective date of its rate filing, 14 July 1972, through 13 December 1972.

2. I&M may collect the difference between its old and new rates for the period from 14 December 1972 through 13 January 1973.

3. Should the Commission determine during the course of its current hearings that I&M's filed rates are unjust or unreasonable, it may order I&M to refund the amounts collected after 13 December 1972 in excess of the just and reasonable rates.

I. *Equitable Factors*

Under our original order, I&M's customers would be obligated to pay retroactive rate increases for the five-month period during which the Commission's unlawful suspension order was in effect. This would create considerable hardship for I&M's customers, for, in reliance on the Commission's suspension order, they failed to seek increases in their own rates to offset I&M's increased

1. Richmond Power and Light and Anderson Power and Light filed memoranda in support of the Commission's petition. The Indiana and Michigan Municipal Distributors Association (IMMDA) and the City of Auburn, Indiana, a member of the IMMDA, submitted separate petitions for rehearing. In addition, the IMMDA filed a suggestion for rehearing *en banc*. I&M filed a reply memorandum.

charges. Since I&M's customers are precluded by federal law[2] and the relevant state statutes[3] from retroactively raising their rates, our original order would force them to absorb out of their own current assets the five months of retrospective increases in I&M's rates. These substantial amounts[4] would impose a significant burden on the finances of I&M's customers.[5]

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2. *See FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-53 (1962); *State Corp. Comm'n* v. *FPC*, 215 F.2d 176, 184 (8th Cir. 1954). These cases interpreted section 4 of the Natural Gas Act, 15 U.S.C. §717c (1970), which is virtually identical to section 205 of the Federal Power Act, 16 U.S.C. §824d (1970).

3. *See* IND. STAT. ANN. §8-1-2-42 [§54-317] (Burns [Code Ed.] 1973); MICH. STAT. ANN. §22.13(6a) (Callaghan '1974 Supp.). Under MICH. STAT. ANN. §22.13(6) (1970), municipally-owned utilities are not subject to the jurisdiction of the Michigan Public Service Commission. Therefore, it is not clear on the face of the Michigan statutes whether the municipally-owned, Michigan customers of I&M could increase their rates retroactively.

4. The estimated cost to I&M's municipal customers for the six-month period 14 July 1972 through 12 January 1973 is $2,601,951. Affidavit of Fred R. Saffer, 26 February 1974, attached to IMMDA Suggestion for Rehearing En Banc.

5. In an affidavit attached to the IMMDA Suggestion for Rehearing En Banc, the Chairman of the Board of Public Works of Fort Wayne, Indiana, represented:

> That in the event the Court's opinion remains unmodified with respect to requiring that Indiana & Michigan Electric Company's June 13, 1972, rate filing should become effective as of July 14, 1972, the sum required to be paid for the period of July 14, 1972, through January 13, 1973, will amount to approximately Four Hundred Seventy Thousand Dollars ($470,000.00), the payment of which will cause considerable hardship to the City of Fort Wayne. The City will be unable to adequately maintain its system as by law required as a direct result of being required to make such payment. The City cannot recover this $470,000 payment since the City's rates were not increased for this item and cannot be increased retroactively.
>
> * * *
>
> That if the Court's opinion remains unmodified, the impact on the financial condition of the City of Fort Wayne's City Light and Power Utility will be extremely detrimental in that said City will have to absorb the increased rates without having the ability to raise its retail rates to provide for these additional past costs.

In addition, I&M's customers have been paying the higher rates provided for by I&M's new tariff schedule since 13 January 1973. Those rates are now subject to scrutiny in Commission hearings to determine whether they are just and reasonable. Our main opinion would deprive the Commission of authority to order refunds by I&M to its customers in the event the Commission finds that some portion of I&M's increases are unjustified. The Commission's power to order refunds arises from section 205(e) of the Federal Power Act[6] and is directly tied to the exercise of the Commission's suspension power. Under section 205(e), if the Commission suspends a filing utility's rates and orders hearings on their justness and reasonableness, if those hearings overrun the suspension period, and if the filed rate increases are found unreasonable, the Commission may "by further order require [the filing] public utility or public utilities to refund, with interest, . . . such portion of [the] increased rates or charges as by its decision shall be found not justified."

Under our main opinion, which renders the Commission's 11 August 1972 suspension order a nullity, the Commission's hearings on the reasonableness of I&M's rates cannot rest on the authority of section 205(e), but rather on section 206(a), and thus the Commission does not have the correlative power to order refunds pursuant to section 205(e).[7] Consequently, the Commission's hearings can continue only under the authority of section 206(a), and this unambiguously provides that "the Commission shall determine the just and reasonable rate . . . to be *there-*

6. 16 U.S.C. §824d(e) (1970).

7. *See* note 35 and accompanying text of the 14 February 1974 opinion in this case.

after observed and in force, and shall fix the same by order.'"[8] The Supreme Court has interpreted this language as precluding the Commission from ordering refunds, even when it determines that the rates in effect are unjust and unreasonable.[9] Under our main opinion, then, I&M's customers would be forced to pay possibly excessive rates from 13 January 1973 until the conclusion of the Commission's ongoing hearings without any prospect of receiving refunds of the excessive amounts paid.

Our concern about the liability of I&M's customers for retroactive rate increases, and payment by those customers of possibly unreasonable rates without right to refunds, is intensified by the fact that the Commission explicitly found in its 11 August 1972 order that I&M's filed rates may be unjust or unreasonable. The Commission stated:

> The proposed rates and charges . . . have not been shown to be justified and may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. It has also been alleged that I & M's proposed tariff changes are contrary to the economic stabilization program and antitrust policies and that interchange of energy should be provided for. It is necessary and appropriate in the public interest and in carrying out the provisions of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of the rates, charges, classifications, services, and other provisions contained in

8. 16 U.S.C. §824e(a) (1970) (emphasis supplied).

9. *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956); *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 254 (1951). *See also Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378, 389 (1959) (Natural Gas Act §5, 15 U.S.C. §717d (1970)); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944) (Natural Gas Act §5).

> I & M's proposed FPC Electric Tariff, and the use thereof deferred as hereinafter provided.[10]

Thus, the strong potential that hardship to I&M's customers could result from our main opinion is compelling.

Moreover, the equitable stake of I&M in our main opinion is not significant. I&M sought from the Commission no greater relief than our modified order now grants. In its application for rehearing before the Commission, I&M requested that the Commission

> [i]ssue a supplemental order modifying ordering paragraph (C) of its August 11, 1972 Order in this proceeding, so as to provide that I&M's proposed rate schedules are suspended for five months beginning July 14, 1972 and their use deferred until December 14, 1972 . . . .[11]

By modifying our original order in the manner set out above, we eliminate the potential for hardship to I&M's customers and we accord I&M precisely the relief it sought from the Commission. The equities clearly dictate that we reinstate the suspension of I&M's rates for the period from 14 July 1972 through 13 December 1972, and restore to the Commission its power under section 205(e) to order refunds of any amounts paid by I&M's customers after 13 December 1972 that the Commission finds excessive.

II. *The Court's Equity Powers*

A court sitting in review of an administrative agency is vested with equity powers which it may employ in a

10. Joint App. at 164.

11. *Id.* at 176. *See* note 34, main opinion, second paragraph.

manner defined by the Supreme Court in *Ford Motor Co.* v. *NLRB*:[12]

> [W]hile the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements.[13]

By our exercise of equity powers herein, we are "adjust-[ing] [our] relief to the exigencies of the case in accordance with the equitable principles governing judicial action." In so doing, we are acting, we believe, "within the bounds" of the Federal Power Act; indeed, our main opinion promotes the Act by confining the Commission to its statutory authority, and this supplemental opinion is designed to advance the policies and procedural safeguards of section 205 of the Act.[14]

The Supreme Court's decision in *United States* v. *Morgan*[15] is instructive here. Under the authority of the Packers and Stockyards Act[16] the Secretary of Agriculture had declared the schedule of maximum rates charged for stockyard services unlawful and prescribed a new,

12. 305 U.S. 364 (1939).

13. *Id.* at 373.

14. 16 U.S.C. §824d (1970). The policy expressed in section 205(a) is to promote just and reasonable rates. *See Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378, 388 (1958) (Natural Gas Act). The procedural safeguards provided by section 205 include the Commission's suspension and refund powers. *See* text accompanying notes 6-7 *supra*.

15. 307 U.S. 183 (1939).

16. 7 U.S.C. §§181-229 (1970).

lower schedule of rates. Stockyard companies filed suit in District Court, which temporarily restrained the Secretary's order on condition that the stockyard companies deposit the amounts received in excess of the Secretary's prescribed rates with the clerk of the court. Ultimately, the Supreme Court held the Secretary's order invalid because the Secretary had failed to accord the stockyard owners the full hearing to which they were entitled under the Act.[17] On remand the District Court ordered that the fund accumulated by the clerk during the pendency of the suit be returned to the stockyard owners. The Supreme Court reversed. It directed the District Court to hold the fund that it had collected until the Secretary rendered a decision, after full hearings, on the lawfulness of the stockyard rates. If the Secretary again found the old rates unlawful, the District Court was instructed to distribute to stockyard customers the difference between the old rates and the lawful rates. The Court's basic rationale was as follows:

> Congress having by the Packers and Stockyards Act established the public policy of maintaining reasonable rates for stockyard services, and having prohibited and declared unlawful any unjust or unreasonable rate, a court of equity should be astute to avoid the use of its process to effectuate the collection of unlawful rates . . . .[18]

The Court so held although it conceded that the Secretary could prescribe lawful rates only for the future and

17. *Morgan* v. *United States*, 298 U.S. 468 (1936); 304 U.S. 1 (1938).

18. 307 U.S. at 194.

could not act with respect to charges collected in the past.[19] It reasoned that the Secretary had already found the stockyard rates unlawful, although he had done so in a procedurally defective manner. If the Secretary subsequently decided to reaffirm his earlier decision through proper procedures, he could not directly order refunds of the excessive amounts paid by stockyard customers in the past. However, such a decision would justify restitution to the customers of the amounts held by the clerk of the District Court. Similarly, we have found an order of the Commission invalid on the basis of a procedural defect (untimeliness). But in order to advance the Federal Power Act's policy of maintaining just and reasonable rates, we have provided that refunds to the filing utility's customers will be apropriate if the Commission subsequently makes definite its earlier finding that I&M's filed rates may be unlawful by so holding in a final decision.

Finally, we are not "intruding upon the administrative province" by our actions herein. Our denial to I&M of retroactive relief for the period 14 July 1972 through 13 December 1972 is not an infringement upon the Commission's exclusive suspension power.[20] The Commission ex-

19. *Id.* at 189-90.

20. As recognized by this court in *Pennsylvania Gas & Water Co.* v. *FPC*, 150 U.S. App. D.C. 151, 463 F.2d 1242 (1972) (Natural Gas Act §4(e), 15 U.S.C. §717c(e) (1970)).

We may distinguish the instant case from *United States* v. *SCRAP*, 412 U.S. 669 (1973), and *Arrow Transp. Co.* v. *Southern Ry. Co.*, 372 U.S. 658 (1963), which interpreted the suspension provision of the Interstate Commerce Act, §15(7), 49 U.S.C. §15(7) (1970). In *Arrow*, the Supreme Court held that the District Court had infringed upon the exclusive suspension power of the Interstate Commerce Commission when it enjoined implementation of a filed rate schedule after the statutory seven-month suspension period had

plicitly determined that suspension was appropriate but failed to issue its suspension order in a timely fashion. Nor are we interfering with the Commission's statutory role as the sole body responsible for determining whether an electric utility's filed rates are just and reasonable. We have not relieved I&M's customers of the burden of paying I&M's filed rates. We have merely provided that if the Commission subsequently determines that the filed rates are unjust or unreasonable, it may order I&M to refund the excess amounts paid by its customers.[21] Thus, we are convinced that our exercise of equity powers here promotes the policy of the Federal Power Act without violating the terms of the Act or infringing upon the exclusive domain of the agency charged with implementing the Act.

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expired. The Court endorsed the following statement by the Fifth Circuit, which had reversed the District Court's decree:

> Congress, in its wisdom, has fixed seven months as the maximum period of suspension. It seems clear to us that if the courts extend that period, they are in effect amending the statute and that is a matter beyond their power.

372 U.S. at 662, *quoting* 308 F.2d 181, 186 (1962). In *SCRAP* the District Court enjoined collection of railroad freight surcharges despite the fact that the ICC had denied requests to suspend the surcharges for the statutory seven-month period under section 15(7). The Supreme Court reversed, noting that the District Court's "injunction constitutes a direct interference with the Commission's discretionary decision whether or not to suspend the rates." 412 U.S. at 692. In the case at bar, our denial of retroactive increases to I&M for the five-month period from 14 July 1972 through 13 December 1972 does not extend the statutory five-month suspension period as was the case in *Arrow*. Moreover, our order does not interfere with the Commission's "discretionary decision whether or not to suspend"; rather, it gives effect to the Commission's decision that suspension was appropriate.

21. *Cf. United States* v. *Morgan*, 307 U.S. 183, 198 (1939); *Middlewest Motor Freight Bureau* v. *United States*, 433 F.2d 212, 231 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

Our decision draws support from *Mississippi River Fuel Corp.* v. *FPC*,[22] in which the Third Circuit held that the Commission had acted outside its authority by summarily rejecting the filing utility's rate schedule without a hearing. This rejection, the court found, violated the procedural requirements of sections 4 and 5 of the Natural Gas Act,[23] which are virtually identical to sections 205 and 206 of the Federal Power Act. The court ordered that the filed rates be given immediate effect, but "subject to the right of the Commission forthwith to direct and give notice of a hearing upon the new schedules and to safeguard customers of petitioner in the payment of the new tariffs pending the outcome of such hearing by requiring petitioner to file such bond as is contemplated and authorized by section 4(e)." The court thus permitted the Commission to proceed with hearings on the justness and reasonableness of the proposed rates under section 4(e) (the counterpart in the Natural Gas Act to section 205(e) of the Federal Power Act), *with full authority to order refunds,* despite the fact that the technical effective date of the filing utility's new rates had long since passed.[24]

The filing utility subsequently moved to modify the court's order by making its rate filing effective retroactively to 1 June 1952, or 31 days after the date of filing. The court denied the motion, thus in effect imposing a *de facto* suspension of several months on the filed

22. 202 F.2d 899 (3d Cir.), *cert. dismissed,* 345 U.S. 988 (1953).

23. 15 U.S.C. §§717c & 717d (1970).

24. The rates were filed on 30 April 1952, with a proposed effective date of 1 June 1952. The court issued its main opinion on 9 February 1953.

rates. The court justified its decision by reasoning that granting the retroactive relief requested (1) would force the filing utility's principal customer "to pay additional retroactive charges of about $3,000,000 *for gas it already has resold to its own customers on the basis of* [*the filing utility's*] *existing rate to it*" [25] and (2) would fly in the face of "an affirmative though legally misconceived rejection of [the] proposed rate increase by the administrative body which had jurisdiction over the subject matter." [26] In the instant case, we have justified our modified relief herein in part on the basis that (1) granting I&M fully retroactive relief would impose substantial, irrecoverable costs on I&M's customers,[27] and (2) the Commission has affirmatively found that I&M's rates may be unjust or unreasonable, although it implemented its finding in a procedurally defective manner.[28] Therefore, we believe our exercise of equity powers can rest on the authority of *Mississippi River Fuel* as well as *United States* v. *Morgan.*

III. *Conclusion*

For the reasons stated herein, we grant the petitions for rehearing and modify our main opinion of 14 February 1974 in the manner set out in the third paragraph of this opinion.

So ordered.

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25. 202 F.2d at 904 (emphasis supplied).

26. *Ibid.*

27. Notes 2-5 *supra* and accompanying text.

28. Text accompanying note 10 *supra. See United States* v. *Morgan,* discussed in text accompanying notes 15-19 *supra; Atlanta Coast RR. Co.* v. *Florida,* 295 U.S. 301, 311-12 (1935).

Judgment of the Court of Appeals Dated February 14, 1974

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-2168 September Term, 1973

Indiana & Michigan Electric Company,
Petitioner,

v.

Federal Power Commission,
Respondent.

Richmond Power and Light of the City of Richmond, Indiana, Indiana & Michigan Municipal Distributors Asso., Anderson Power and Light of the City of Anderson, Indiana,
Intervenors.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

Before: Bazelon, Chief Judge, Robinson and Wilkey, Circuit Judges

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Federal Power Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of this Court filed in the above captioned case on June 19,

1973, dismissing the petition for Review as moot, is vacated, and it is

FURTHER ORDERED AND ADJUDGED by this Court that the orders of the Federal Power Commission here in issue are vacated and this case is remanded for implementation of the opinion filed herein this date.

Per Curiam
For the Court

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

Date:
Opinion for the Court filed by Circuit Judge Wilkey

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 14 1974

HUGH E. KLINE
Clerk

Opinion of the Court of Appeals Dated February 14, 1974

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-2168

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

RICHMOND POWER & LIGHT OF THE CITY OF RICHMOND, INDIANA
INDIANA & MICHIGAN MUNICIPAL DISTRIBUTORS ASSO.
ANDERSON POWER & LIGHT OF THE CITY OF ANDERSON, INDIANA, *Intervenors*

Petition for Review of an Order of the Federal Power Commission

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Decided 14 February 1974

Before: BAZELON, *Chief Judge*, ROBINSON and WILKEY, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge:* Indiana & Michigan Electric Company (hereinafter I&M) filed proposed changes in its tariff schedule with the Federal Power Commission

on 13 June 1972. By letter of 3 July 1972, the Secretary of the Commission acknowledged I&M's filing and advised the company that "[t]he earliest effective date for the increase consistent with [Section 35.13(b)(4)(i)] of the Regulations would be August 13, 1972."[1] This section of the Commission's regulations[2] requires that, whenever

1. Joint App. at 162.

2. 18 C.F.R. §35.13(b) (4) (i) (1973):

> Except as provided in subdivision (ii) of this subparagraph, if the rate schedule provides for an increased rate, then 60 days prior to the date that such changed rate is proposed to become effective the filing public utility shall submit a statement showing its cost of the service to be supplied under the new rate schedule according to supporting statements A through O as described below. Simultaneously, the public utility shall submit the material on sales and revenues described in paragraph (a) of this section and, unless the rate schedule containing the proposed increased rate is likewise simultaneously filed, a summary statement of such proposed increased rate: *Provided, however,* That the submittal of such summary statement of the rate schedule shall not be in lieu of the rate schedule as required to be filed with the Commission pursuant to the regulations in this part.

Supporting statements A through O specify filing of the following data: balance sheet, income statements, earned surplus statement, cost of plant, accumulated depreciation, average working capital, rate of return, debt capital, operating expenses, depreciation expense, income taxes, other taxes, overall cost of service, allocated cost of service, comparison of cost of service, and "fuel adjustment factor."

In addition, 18 C.F.R. §35.13(b)(5) (1973) provides:

> A utility filing for an increase in rates and charges shall be prepared to go forward at a hearing on reasonable notice on the data which have been submitted and sustain the burden of proof, imposed by the Federal Power Act, of establishing that its proposed charges are just and reasonable and not unduly discriminatory or preferential or otherwise unlawful within the meaning of the Act. The Commission is desirous of avoiding delay in processing rate filings. To this end, if the rate schedule provides for an increase in rate which exceeds $30,000 in revenues for the test period, the filing utility shall submit with its rate increase filing 60 days prior to the proposed effective date of such increased rates,

a filing calls for a rate increase, certain cost-of-service data and a summary of the proposed rates be filed 60 days prior to the date the rates are to take effect. On 18 July 1972 I&M applied to the Commission for an order making its new rate schedule effective as of 14 July, or 31 days after the date on which I&M had previously filed. On 11 August 1972 the Commission accepted I&M's rates for filing but designated 13 August as their effective date; it then suspended their use for five months thereafter, or until 13 January 1973.[3] By order dated 6 October 1972 the Commission denied I&M's application for rehearing.[4]

I&M's petition for review of the Commission's order was originally consolidated with petitions by two of I&M's customers, Richmond Power and Light and Anderson Power and Light. On 25 May 1973 this court held that I&M's rate filing was unlawful with respect to Richmond and Anderson because it violated the terms of their contracts with I&M.[5] However, since the parties here have represented to the

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testimony and exhibits of such composition, scope and format that they would serve as the company's case-in-chief in the event the matter is set for hearing. In addition to whatever material the utility chooses to submit as part of its case, except for increases resulting from changes made in fuel clauses and increases of rates comprising an integral part of coordination and interchange arrangements in the nature of power pooling transactions, the exhibits shall include full cost of service data, as identified in subparagraph (4)(iv) of this paragraph, statements A through O, and the accompanying testimony should include an explanation of these exhibits.

3. *Indiana & Michigan Electric Co.*, F.P.C. Docket No. E-7740, Joint App. at 158.

4. Joint App. at 196. Commissioner Moody filed a dissenting view.

5. *Richmond Power & Light* v. *FPC*, No. 72-1963 and *Anderson Power & Light* v. *FPC*, No. 72-2035, *cert. denied*, No. 73-511 (3 Dec. 1973).

court that I&M's contract with at least one of its other 22 customers[6] is different from the Richmond and Anderson contracts, I&M's petition to have the effective date of its new rate schedule retroactively altered to 14 July 1972 remains viable.[7]

Because the Commission lacked statutory authority to delay the effective date of I&M's filing until 13 August 1972 and to suspend the new rates until 13 January 1973, we vacate the Commission's order of 11 August 1972 and remand to the Commission with instructions that I&M's 13 June rate filing be given effect as of 14 July 1972.[8]

I. Jurisdiction of the Court to Consider the Validity of the Commission's 60-Day Regulation

The liminal question here is whether this court can, consistent with section 313(b) of the Federal Power Act, consider I&M's contention that the Commission's 60-day prefiling regulation is invalid. Section 313(b) provides, in relevant part: "No objection to the order of the Com-

6. Thirteen of these customers are affiliated in the Indiana and Michigan Municipal Distributors Association, an intervenor in this case. Eight others are rural electric cooperatives.

7. Counsel for I&M informed the court at oral argument that the city of Auburn, Indiana has the same contract with I&M as Richmond and Anderson. Therefore, the Commission has declared I&M's filing ineffective as to Auburn. The court will not in the context of this case attempt to determine to which of I&M's customers the new rate schedule can lawfully apply. We leave such determinations to the Commission, whose orders can then be brought to this court by aggrieved parties through normal review procedures.

8. This will involve collection by I&M from its customers of the difference between the increased rates and the rates actually charged for the six-month period from 14 July 1972 to 13 January 1973. There is precedent in this circuit for ordering retroactive rate adjustments. *See Tennessee Valley Municipal Gas Ass'n* v. *FPC,* 152 U.S. App. D.C. 298, 470 F.2d 446 (1972), a case that arose under the Natural Gas Act, 15 U.S.C. §§717 *et seq.* (1970).

mission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.'"[9]

While I&M did not expressly raise the legality of the 60-day regulation in its application for rehearing, it did challenge the Commission's statutory authority to set an effective date 60 days after I&M's filing.[10] The Commission characterized I&M's position in seeking a rehearing as follows: "I&M asserts that the Commission has no authority to require a notice in excess of the thirty days specified in Section 205(d) of the Federal Power Act."[11] Apparently perceiving I&M's position as a challenge to the 60-day regulation, the Commission devoted two of the five pages of its order denying rehearing to an attempted justification of the regulation.[12] Commissioner Moody joined issue with the majority and attacked the validity of the regulation in his dissent.[13] Clearly, then, I&M brought sufficient attention to the issue to stimulate the Commission's consideration of it.

The rationale of the requirement that an aggrieved party exhaust its administrative remedies, as provided by section 313 of the Federal Power Act, is " 'that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it

9. 16 U.S.C. §825*l*(b) (1970).

10. Joint App. at 169.

11. Joint App. at 198.

12. Joint App. at 198-99.

13. Joint App. at 203.

has an opportunity for correction . . . .' "[14] I&M gave the Commission an opportunity to correct its alleged error in setting the effective date of I&M's rates. Furthermore, I&M suggested the possibility that the 60-day regulation is invalid by inviting the Commission to construe the regulation in a manner "compatible with the Commission's statutory authority."[15] The Commission declined to correct its alleged error and explicitly defended the validity of its regulation. Thus, I&M should be permitted to assert the regulation's invalidity in this court.

II. The Commission's 60-Day Prefiling Regulation

The Commission delayed the effective date of I&M's rate filing pursuant to section 35.13(b)(4)(i) of its regulations.[16] This section requires that if a proposed rate schedule calls for increased rates, the utility must file with the Commission "a statement showing its cost of the service to be supplied under the new rate schedule," "a summary statement of [the] proposed increased rate," and certain material on sales and revenue under the old rates and the proposed rates, all "60 days prior to the date that such changed rate is proposed to become effective."[17] Much of the data required presupposes the existence of a completed rate schedule. Obviously, a "summary statement of [the] proposed increased rate" cannot be filed unless the thing

14. *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 500 (1955), *quoting United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37 (1952).

15. Application for Rehearing of Indiana & Michigan Electric Co., F.P.C. Docket No. E-7740, Joint App. at 174.

16. 18 C.F.R. §35.13(b)(4)(i) (1973), set out in note 2 *supra*.

17. *Ibid.*

to be summarized, the rate schedule itself, has been prepared. Included in the cost-of-service items required are "the percentage rate of return claimed,"[18] "the maximum demands of the service under the proposed rate schedules,"[19] and "revenues under the proposed rates."[20] Accurate calculation of these items would be difficult, if not impossible, in the absence of a detailed schedule of the proposed rates. Similarly, a detailed schedule is a prerequisite to calculation of "[a] statement comparing sales and services and revenues therefrom . . . under both the rate schedule proposed to be superseded or supplemented and the proposed changed rate schedule."[21] Finally, section 35.13(b)(5) further requires that "the filing utility shall submit with its rate increase filing 60 days prior to the proposed effective date of such increased rates, testimony and exhibits of such composition, scope and format that they would serve as the company's case-in-chief in the event the matter is set for hearing."[22] Again, preparation of such information depends upon the existence of the completed rate schedule.

It seems clear, then, that in order to comply with the requirements of section 35.13(b), a utility must be prepared to make a complete filing of its new rate schedule. Thus, the practical effect of the section is to impose a *de facto*

18. *Ibid.* (Statement G).

19. *Ibid.* (Statement M (3)).

20. *Ibid.* (Statement N).

21. 18 C.F.R. §35.13(b)(1) (1973). Section 35.13(b)(4)(i) refers to filing of "material on the sales and revenues described in paragraph (a) of this section." The reference to paragraph (a) is apparently an error since paragraph (a) says nothing about material on sales and revenue.

22. 18 C.F.R. §35.13(b)(5) (1973), set out in full in note 2 *supra*.

60-day notice requirement on utilities seeking to increase their rates. Such a requirement contravenes the terms of section 205(d) of the Federal Power Act, which provides:

> Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.[23]

The Supreme Court has interpreted this language to create not only a *minimum notice period* for the utility's customers and the Commission, but also a *maximum waiting period for the filing utility.* In *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*,[24] the Court construed section 4(d) of the Natural Gas Act,[25] whose language is virtually identical to that in section 205(d) of the Federal Power Act, as providing for "the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate Commission review."[26] Thirty days is the maximum a utility can be

23. 16 U.S.C.§824d(d) (1970).

24. 358 U.S. 103 (1958).

25. 15 U.S.C. §717c(d) (1970).

26. 358 U.S. at 114.

compelled to wait from the time it files its rate changes until the date the changes take effect unless the Commission properly exercises its suspension power. Under the Commission's regulations, a utility must make a *de facto* rate filing 60 days in advance of the effective date. Therefore, the regulations unlawfully extend the statutory waiting period for utilities by 30 days.

The Commission asserts that the 60-day prefiling requirement of section 35.13(b)(4)(i) is necessary to "the proper exercise of its ratemaking authority under the Federal Power Act."[27] To exercise its authority properly, the Commission must evaluate in each case the advisability of suspending the rate filing pending full hearings on the reasonableness of the proposed rates. The Commission argues that "[t]he difficulty of such evaluations often requires more time than the 30 days to which I&M would restrict the Commission."[28] This statement fixes responsibility for the 30-day "restriction" with the wrong party, for it is Congress that specified 30 days from the filing date as providing for "the earliest effectuation of contractually authorized or otherwise permissible rate changes *consistent with appropriate Commission review.*"[29] If the Commission cannot properly exercise its ratemaking authority within the 30-day time frame prescribed by section 205(d), it should address its grievance to Congress, not to the judiciary.

The result we reach here is not foreclosed by this court's decision in *Municipal Light Boards* v. *FPC*.[30] As

27. Brief for Respondent at 25.

28. *Id.* at 26.

29. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 114 (1958) (emphasis supplied).

30. 146 U.S.App.D.C. 294, 450 F.2d 1341 (1971).

Commissioner Moody pointed out in his dissent to the Commission's denial of I&M's application for rehearing, the validity of section 35.13(b) of the Commission's regulations was not really in question in *Municipal Light Boards*.[31] The parties in that case merely assumed the provision's validity and contested the issue of whether the Commission could *waive* its own regulation by permitting a *less-than-60-day* waiting period. Consequently, we properly expressed no view on a possible issue never raised by any party, *i.e.*, whether promulgation of the regulation was within the Commission's statutory authority.

Under section 205(d) of the Federal Power Act, I&M was entitled to an effective date of 14 July 1972 for the rate schedule it filed on 13 June. The Commission therefore acted unlawfully by delaying the effective date until 13 August.[32]

III. The Five-Month Suspension of I&M's Rates

Section 205(e) of the Federal Power Act empowers the Commission to hold hearings on the lawfullness of a

31. Joint App. at 203.

32. The Commission's staff reached this conclusion in a letter to the Commission captioned "Commission Staff Response to Application of Indiana & Michigan Electric Company" and dated 28 July 1972. The letter stated:

> In I & M's case, if five months' suspension is ordered and the 60-day rule is invoked, the proposed rates would not go into effect until six months after the proposed effective date. If the rate changes are accepted for filing without suspension, the effective date would be 60 days after the proposed effective date. It may be observed further that the Commission's Regulations Under the Natural Gas Act do not prescribe a 60-day filing requirement and that the same threshold decision as to whether to order an investigation and hearing, or a suspension, or both, must be made. Since both Section 4(d) of the Natural Gas Act and Section 205(d) of the Federal Power Act require only 30 days' notice of rate changes, the staff respectfully submits that it would be inappropriate to require more of I & M.

Joint App. at 87.

proposed rate schedule and, pending such hearings, to suspend use of the schedule for no longer than five months "beyond the time when it would otherwise go into effect." [33] The Commission recognized in its order denying rehearing that it "does not have statutory authority to issue a suspension order after a proper proposed effective date." [34] Commissioner Moody seconded this observation in his dissent:

> Once proposed rates have become effective this Commission is powerless to suspend the effectiveness of, or otherwise modify, those rates under § 205 of the Federal Power Act. Our only recourse is to in-

33. 16 U.S.C. §824d(e) (1970).

34. Joint App. at 200. A similar recognition occurred in *Central Maine Power Co.*, F.P.C. Docket Nos. E-7824 and E-8038 (8 June 1973), in which the Commission stated:

> With respect to the request for suspension of Central Maine's proposed amendment and for refund protection thereunder, we find that the proposed amendment became effective by operation of law on March 16, 1973, thirty days after filing and prior to the issuance of the Commission's order on April 10, 1973. We are without authority under the Federal Power Act to rescind or suspend the effectiveness of the proposed amendment.

See also Phillips Petroleum Co. v. *FPC*, 227 F.2d 470 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956).

It is to be observed that I&M's application of 18 July 1972, asking for a Commission order making the new rate schedule effective retroactively as of 14 July, would possibly have permitted the Commission to issue a suspension order for five months from the valid effective date of 14 July 1972. At least, it is clear that I&M would not have been in a position to challenge such an order as it has now, and that I&M was not seeking a procedural gimmick which would have resulted, as now has occurred, in voiding the Commission's five-month suspension order. However, we do not reach the question suggested by this discussion since the Commission has never asserted that I&M's 18 July application for a 14 July effective date gave the Commission jurisdiction to suspend I&M's rates retroactively from 14 July; rather, the Commission has been consistent in contending that 13 August was the effective date and that the 11 August suspension was therefore valid.

stitute a proceeding under § 206(a) of the Act and after hearing determine just and reasonable rates to be thereafter observed and in force."[35]

Since we hold that the lawful effective date of I&M's rate filing was 14 July 1972, the Commission had no authority to suspend use of the new rate schedule on 11 August 1972. Therefore, the Commission's suspension order of that date must be vacated.

IV. Conclusion

The Commission has exceeded its statutory authority by delaying the effective date of I&M's rate filings beyond the 30 days prescribed by section 205(d) of the Federal Power Act. Therefore, we order that the effective date of I&M's filing be changed retroactively to 14 July 1972. It inevitably follows that the Commission's 11 August suspension order was *ultra vires* and must be invalidated. The orders here in issue are vacated and the case is remanded for implementation of this opinion.

Vacated and Remanded.

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35. Joint App. at 202. Section 206(a) of the Act, 16 U.S.C. §824e(a) (1970), provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

Order of the Commission Dated August 11, 1972

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: JOHN N. NASSIKAS, Chairman; ALBERT B. BROOKE, JR., and PINKNEY WALKER.

INDIANA & MICHIGAN ELECTRIC COMPANY
Docket No. E-7740

Order Accepting for Filing and Suspending Revised Tariff Sheets, Denying Motions to Reject Filing, Providing for Hearing, Establishing Procedures, Permitting Interventions, Denying Waiver, and Fixing Effective Date

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(Issued August 11, 1972)

Indiana & Michigan Electric Company (I & M) on June 13, 1972, tendered for filing the following tariff changes,[1] each of which was proposed to become effective on July 14, 1972:

(1) First revised sheets No. 7 to 11-3 to the Company's FPC Electric Tariff MRS, under which twelve municipal customers are being served;

(2) Supplements to four rate schedules under which four municipal customers are being served;

(3) Supplements to eight rate schedules under which seven rural electric cooperative customers are being served; and

(4) New FPC Electric Tariff WS, Original Volume No. 1, of the Company.

1. See designations in the appendix to this order.

The proposed changes would increase I & M's revenues from jurisdictional sales and service by approximately $6,180,000 anually based on the 12-month period ending December 31, 1971, as adjusted. I&M stated that the rate increase is necessitated primarily by the fact that at March 31, 1972, I & M's earnings were insufficient to permit the company to issue any additional long term debt to finance its construction program.

Notice of I & M's proposed changes was issued on June 23, 1972, and was published on June 30, 1972, 37 F.R. 12998. The notice required protests and petitions to intervene to be filed by July 5, 1972. By notice issued July 3, 1972, the date was extended until July 15, 1972, upon the request of Indiana Municipal Electric Association.

A protest against I & M's proposed changes was filed on June 28, 1972, by Coalition for the Environment, Inc., Fort Wayne, Indiana. A letter on behalf of the City of Bluffton, Indiana, in opposition to the proposed rate increase was also received. A letter in protest was received from the Honorable Birch Bayh, United States Senate, on August 7, 1972. Protests and petitions to intervene were filed by the City of Fort Wayne, Indiana, and by the City of Anderson, Indiana,[2] on July 3, 1972, and by a group of municipally-owned electric distributor customers[3] of I & M together

2. On August 2, 1972, the City of Anderson filed a document entitled "Supplemental Petition to Intervene, Formal Protest and Request for Rejection of Rate Schedules Submitted for Filing" alleging (1) that the proposed tariff changes are discriminatory, (2) that they are not permitted by the City's contract with I & M and should be rejected, and (3) that they should be suspended for five months and a hearing held.

3. Auburn, Indiana; Avilla, Indiana; Bluffton, Indiana; Columbia City, Indiana; Frankton, Indiana; Garrett, Indiana; Gas City, Indiana; Mishawaka, Indiana; New Carlisle, Indiana; Niles, Michigan; South Haven, Michigan; Sturgis, Michigan; Warren, Michigan.

with the Indiana and Michigan Municipal Distributors Association[4] on July 10, 1972.

Richmond Power and Light of the City of Richmond, Indiana (RP & L)[5] filed on July 3, 1972, a document entitled Protest, Motion to Reject, or, in the Alternative, Request for Hearing and Maximum Suspension Period. RP & L moves to reject I & M's filing on the grounds that it is discriminatory and is contrary to antitrust and other policies and that it violates contracts filed with and approved by the Public Service Commission of Indiana. RP & L also states that the proposed WS Tariff makes no provision for interchange of energy and that

> * * * the Commission pursuant to Section 202(b) of the Federal Power Act should order an interchange agreement between RP & L and I & M similar to that between Gainesville Utility Department and Florida Power Corporation (Protest, pp. 2-3).

RP & L further states that I & M is not permitted by contract to request an effective date prior to final approval of the proposed rate increase by the Public Service Commission of Indiana. In its alternative request, RP & L asks that I & M's proposed tariff changes be suspended for five months and that if a final order is not issued by the end of the five-month period, I & M be ordered to charge for electric service at no more than the rates prescribed by the

4. This is an *ad hoc* association of the group of 13 municipal customers and the Cities of Richmond, Indiana; Fort Wayne, Indiana; and Anderson, Indiana (Cities). This Association also filed on August 7, 1972, a Motion for Suspension of Proposed Rate Increase, alleging that regulations of the Price Commission require the maximum five months' suspension of I & M's proposed rate increase.

5. RP & L also filed on August 4, 1972, a telegram reiterating its position, and on August 7, 1972, a "Supplement to Motion to Reject Rate Schedule Filing."

company's IP Tariff, as approved by the Public Service Commission of Indiana. RP & L adds that Section 205(e) of the Federal Power Act requires suspension for five months unless a final order is issued sooner.

A group of rural electric cooperative customers[6] (Cooperatives) of I & M filed on July 17, 1972, a Protest and Petition to Intervene and for Rejection of Rate Schedules Submitted for Filing. The Cooperatives ask that I & M's filing be rejected on the grounds that it is not permitted by I & M's contracts with them and that the amount of the increase to the Cooperatives exceeds any permissible amount under the economic stabilization program. The Cooperatives rely on *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 US 332 (1956) and *FPC* v. *Sierra Pacific Power Co.*, 350 US 348 (1956) and on the following contract provisions to sustain their first ground:

Article 3B

> Customer agrees to take and pay for the electric capacity and energy delivered to Customer by Company hereunder in accordance with the provisions of Company's Tariff REMC as filed with the Public Service Commission of Indiana, a copy of which tariff is attached hereto as Exhibit A and is hereby made a part of this agreement.

Article 12

> Firm Agreement As to Rates And Charges: Should any change in the rate provided for in ARTICLE 3

6. Indiana Statewide Rural Electric Cooperative, Inc., Fruit Belt Electric Cooperative, Jay County Rural Electric Membership Corporation, Noble County Rural Electric Membership Corporation, Paulding-Putnam Electric Cooperative, Inc., United Rural Electric Membership Corporation, Wayne County Rural Electric Membership Corporation, and Whitley County Rural Electric Membership Corporation.

hereof be ordered by the Public Service Commission of Indiana, payment for services by Customer to Company as provided for in ARTICLE 3 hereof shall thereafter be made upon the basis of such new rate as changed and approved by the Public Service Commission of Indiana, provided, however, that in the event of such change in rate, either of the parties hereto shall have the right within a period of ninety days, beginning on the date when such change is ordered by the Public Service Commission of Indiana, to terminate this Agreement by giving to the other party at least sixty days prior notice in writing of its intention so to do.

Company agrees that, in the event the rates, terms or conditions of this agreement are questioned or litigated by others than the parties hereto, including but not limited to Public Officials, Company will jointly and in cooperation wtih Customer defend the same before any regulatory body or court.

Article 13

After the expiration of said initial term, this Agreement will be renewed automatically for successive renewal periods of two (2) years thereafter, unless written notice of termination is given by either party to the other at least 36 months prior to the expiration of the initial term or any renewal period.

The Cooperatives protest the proposed rate increase on the grounds that it would produce an unreasonable rate of return to I & M and would have unfavorable consequences for the Cooperatives, including possible anticompetitive effects.

On July 18, 1972, I & M filed answers to the pleadings of the Cities. I & M does not oppose permitting them to intervene. I & M does oppose their requests for five-months'

suspension of the proposed tariff changes. I & M denies that any of the matters alleged in RP & L's pleading establish any basis for granting RP & L's request to reject the proposed rate schedules.

On August 2, 1972, I & M filed an answer to the Cooperatives' protest and petition. I & M opposes the Coperatives' petition for rejection of the proposed rate schedules on the ground that Article 12 of the contracts[7] shows that the parties expressly contemplated and provided for changes in rates. I & M states that the Cooperatives fail to allege any facts or contentions sufficient to warrant suspension of the proposed rates for the maximum period of five months. I & M does not oppose permitting the Cooperatives to intervene in this proceeding.

On July 18, 1972, I & M filed an application for an order fixing July 14, 1972, as the effective date of its proposed rate schedules. The application requests relief, in effect, from a July 3, 1972, letter of the Secretary of the Commission acknowledging I & M's filing and advising the company that:

> The earliest effective date for the increase consistent with [Section 35.13(b)(4)(i)] of the Regulations would be August 13, 1972.

Section 35.13(b)(4)(i) of the Commission's Regulations Under the Federal Power Act requires applicants for rate increases to submit certain data 60 days in advance of the

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7. I & M's answer also quotes the following from Section 6 of the "Other Terms and Conditions" portion of tariff REMC attached to the contracts:

> G. Service shall be furnished and taken under the Company's general rules and regulations on file with the Commission, except to the extent, if any, that the same are expressly modified by the terms and conditions hereinabove provided.

proposed effective date. I & M's tender was made 31 days prior to the proposed effective date of July 14, 1972. The application states that this 60-day filing requirement is unreasonable and unnecessary under the circumstances and that, in any event, it should be waived pursuant to Section 35.11 of the Regulations. The Commission staff responded on July 28, 1972, and suggested that the 60-day filing requirement may be improper because (1) both the Federal Power Act and the Natural Gas Act require only 30-days' notice of rate changes and (2) it operates in effect as an extension of the statutory provisions for five-months' suspension and 30-days' notice of rate changes (See Section 205(e) and 205(d) of the Federal Power Act, respectively). A response in opposition to I & M's applications was filed by the City of Anderson, Indiana, on August 1, 1972, and by RP & L on August 7, 1972.

On August 2, 1972, the Indiana and Michigan Municipal Distributors Association filed a Response to Application for Fixing of Effective Date of Increase. This pleading prays that August 14, 1972, be regarded as the proposed effective date of I & M's tariff changes and that they be suspended for five months. The Association also asks that a phased proceeding be instituted, with the first phase directed to I & M's adjustment to fuel and power costs and the second phase directed to all other issues. This request will be denied because the issues involved in this proceeding are not clearly separable and because phasing this proceeding would impede the most expeditious disposition of it.

The Cooperatives, RP & L, and the City of Anderson, Indiana, have requested that the rate schedules filed by I & M applicable to them be rejected on the ground that the rate changes proposed by I & M are not permitted by

their contracts. This Commission does have authority to reject tariff changes which are not permitted by contract, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 US 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 US 348 (1956). The contract provisions cited by the Cooperatives and I & M indicate that, at the time the agreements were made, the Public Service Commission of Indiana was regarded as the regulatory body with jurisdiction and that rate changes were contemplated by the order or with the approval of that Commission. This Commission's jurisdiction over I & M's wholesale rates has since been asserted and confirmed, *Indiana & Michigan Electric Company*, 33 FPC 739 (1965), affirmed, 365 F.2d 180 (CA 7, 1966), cert. denied, 385 US 972 (1966). For the reasons discussed in *Public Service Company of Indiana, Inc.*, Docket No. E-7645 (orders issued February 25, 1972, and May 25, 1972), petition for review filed, *Indiana Statewide Rural Cooperative, Inc.*, v. *FPC*, CADC No. 72-1696, involving similar facts, we find that I & M's contracts with the Cooperatives are not fixed-rate contracts and that I & M's changes applicable to the Cooperatives should not be rejected as contractually barred, *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 US 103 (1958).

RP & L's request that I & M's tariff changes applicable to it be rejected will also be denied. The approval of the Public Service Commission of Indiana is not a prerequisite to the tendered tariff changes by I & M because that Commission does not have jurisdiction. None of RP & L's other allegations are cause for rejection.

The City of Anderson requests rejection of I & M's Rate Schedule WS on the ground that Anderson's 1957 contract

with I & M provides for Anderson to be served under Tariff IP as long as Tariff IP is in effect and that Anderson has not agreed to take service under any other schedule. I & M's Tariff IP is applicable to I & M's industrial customers and is therefore on file with the Public Service Commission of Indiana. Tariff IP is also applicable to Anderson, RP & L, and other customers taking service subject to this Commission's jurisdiction and is therefore on file as a contract with this Commission. Neither Anderson nor RP & L alleges that a fixed-rate contract exists. We find that I & M is not precluded from filing the changes in rates, terms and conditions of service as embodied in Rate Schedule WS.

In justifying a proposed effective date 31 days after filing, I & M alleges that increased revenues are necessary to improve its interest coverage and to permit the issuance of long-term debt. We find that good cause has not been shown for waiver of the 60-day filing requirement of the Regulations. The proposed rates and charges, furthermore, have not been shown to be justified and may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. It has also been alleged that I & M's proposed tariff changes are contrary to the economic stabilization program and antitrust policies and that interchange of energy should be provided for. It is necessary and appropriate in the public interest and in carrying out the provisions of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of the rates, charges, classifications, services, and other provisions contained in I & M's proposed FPC Electric Tariff, and the use thereof deferred as hereinafter provided. I & M's proposed tariff changes will be sus-

pended for five months beginning August 13, 1972, and will become effective subject to refund on January 13, 1973.

The Commission orders:

(A) Pursuant to the authority of the Federal Power Act, the Commission's Rules of Practice and Procedure, and the Regulations under the Federal Power Act, a public hearing shall be held concerning the lawfullness of the rates, charges, classifications, services, and other provisions contained in Indiana & Michigan Electric Company's proposed FPC Electric Tariff and shall commence with a prehearing conference to be held on November 23, 1972.

(B) I & M's application and request for waiver are denied.

(C) Pending such hearing and decision thereon, I & M's proposed tariff sheets are accepted for filing and are suspended and their use deferred until January 13, 1973.

(D) All motions and petitions to reject I & M's filing are denied.

(E) The request of Indiana and Michigan Municipal Distributors Association for phased proceedings is denied.

(F) The above-named petitioners are hereby permitted to intervene in this proceeding subject to the rules and regulations of the Commission: *Provided, however,* that the participation of such intervenors shall be limited to matters affecting rights and interests specifically set forth in their respective petitions to intervene; and *Provided, further,* that the admission of such intervenors shall not be construed as recognition by the Commission that they, or any

of them, might be aggrieved because of any order or orders issued by the Commission in this proceeding.

(G) The Chief Examiner or any other designated by him for that purpose (See Delegation of Authority, 18 CFR 3.5(d)) shall preside at the hearing in these proceedings and shall prescribe relevant procedural matters not herein provided.

(H) At the prehearing conference the direct evidence of I & M and the Commission staff shall be copied into the transcript, subject to appropriate motions, if any, by the parties to the proceeding, and procedures adopted for an orderly and expeditious hearing. On or before November 14, 1972, the Commission staff shall serve its prepared testimony and exhibits, if any. The prepared testimony and exhibits, if any, of intervenors shall be served on or before December 1, 1972. Rebuttal evidence, if any, of I & M shall be served on or before December 15, 1972. Cross-examination of the evidence filed shall commence at 10:00 A.M. on January 2, 1973, in a hearing room of the Federal Power Commission.

By the Commission.

(SEAL)

MARY B. KIDD,
Acting Secretary.

APPENDIX

Indiana & Michigan Electric Company
Rate Schedule Designations

Filing Date: June 13, 1972
Date of Instruments: June 13, 1972

[Balance of Appendix omitted as not relevant.]

Order of the Commission Dated October 6, 1972

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: JOHN N. NASSIKAS, Chairman; ALBERT B. BROOKE, JR., PINKNEY WALKER, and RUSH MOODY, JR.

INDIANA & MICHIGAN ELECTRIC COMPANY

Docket No. E-7740

Order Denying Rehearing, Request for Oral Argument, Request for Rejection of Rate Filing, and Motion to Reject Supplementary Pleading

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(Issued October 6, 1972)

On August 11, 1972, our "Order Accepting for Filing and Suspending Revised Tariff Sheets, Denying Motions to Reject Filing, Providing for Hearing, Establishing Procedures, Permitting Interventions, Denying Waiver, and Fixing Effective Date" was issued in this proceeding. Applications for rehearing were filed by the City of Anderson, Indiana (Anderson) on September 8, 1972, and by Indiana & Michigan Electric Company (I&M), Richmond Power and Light of the City of Richmond, Indiana (RP&L) and a group [1] of cooperative customers (Cooperatives) of I&M on September 11, 1972.

1. Indiana Statewide Rural Electric Cooperative, Inc., Fruit Belt Electric Cooperative, Jay County Rural Electric Membership Corporation, Noble County Rural Electric Membership Corporation, Paulding-Putnam Electric Cooperative, Inc., United Rural Electric Membership Corporation, Wayne County Rural Electric Membership Corporation, and Whitley County Rural Electric Membership Corporation.

Anderson and RP&L urge that I&M's filing applicable to them should be rejected on the ground that I&M is obligated to serve them under Tariff I.P. as long as it is in effect. Anderson relies on the following contract language, which is nearly identical to that relied on by RP&L:

> The customer hereby agrees to pay the Company monthly for electric energy delivered heerunder at the rate and under the provisions of the regularly filed and published tariff selected by the Customer and known as Tariff I.P. * * * as long as said tariff is in effect; and in the event said tariff is replaced by a new tariff incorporating higher or lower rates than those stipulated herein, the Company will continue to furnish service as stipulated in the contract and the customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective.

Rate Schedule WS containing increased rates was tendered to supersede Tariff I.P. in I&M's rate schedules applicable to service to Anderson and RP&L. RP&L argues further that this contract language represents agreement by I&M that its wholesale rates to RP&L would be the same as I&M's retail rates in its Tariff I.P. on file with the Indiana Public Service Commission.

This Commission has exclusive jurisdiction over I&M's wholesale sales to Anderson and RP&L, and I&M is obligated to charge those rates which are on file with this Commission. This Commission's jurisdiction cannot be limited or avoided by private contract. *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC* v. *Amerada Petroleum Corporation*, 379 U.S. 687 (1965); *J. M. Huber Corp.* v. *FPC*, 236 F.2d 550 (CA3, 1956), cert. denied, 352 U.S. 971 (1957). For service subject to this Commission's jurisdic-

tion, the Tariff I.P. on file with the Indiana Public Service Commission is not applicable. We find that the contracts do not preclude the filing of Rate Schedule WS to supersede Tariff I.P. on file with this Commission.

R P & L also repeats its argument that I & M's filing should be rejected because I & M did not give 90 days' written notice and meet with R P & L to discuss the proposed changes as required by their contract. This ground does not justify rejection because it does not render I & M's filing either "* * * deficient in form or a substantive nullity," *Municipal Light Boards of Reading and Wakefield, Massachusetts* v. *FPC*, 450 F.2d 1341, 1345 (CADC 1971), cert. denied, 405 U.S. 989 (1972). The applications of Anderson and R P & L for rehearing will be denied.

The Cooperatives request rehearing with oral argument and rejection of the proposed rate schedules applicable to them. Their application for rehearing repeats the arguments for rejection which were fully considered in our August 11 order and attacks our orders in *Public Service Company of Indiana, Inc.*, Docket No. E-7645, appeal pending, *Indiana Statewide Rural Electric Cooperative, Inc.* v. *FPC*, CADC No. 72-1696. The Cooperatives imply that denial of their motion for rejection was based solely on the previous orders in Docket No. E-7645. On the contrary, we ruled on the merits of the Cooperatives' contentions in this proceeding and merely referred to the rationale of the previous orders. The Cooperatives dwell nevertheless on Docket No. E-7645 and draw a distinction between that case and this one on the basis of the following language from Article 12 of their contracts:

> Company agrees that, in the event the rates, terms or conditions of this agreement are questioned or

> litigated by *others than the parties hereto,* including but not limited to Public Officials, Company will jointly and in cooperation with Customer defend the same before any regulatory body or court. (emphasis added)

Since I & M is a party to the contracts, this language obviously does not have the effect of precluding I & M from proposing rate changes. The Cooperatives' application and, since the Cooperatives' arguments have been adequately briefed and fully considered, their request for oral argument will be denied.

I & M asserts that the Commission has no authority to require a notice in excess of the thirty days specified in Section 205(d) of the Federal Power Act. By Section 35.13(b)(4)(i) of its Regulations issued under Section 309 of the Federal Power Act, the Commission requires the filing of cost of service data 60 days prior to the proposed effective date of increased rates. The rate schedule setting forth the increased rates need only be filed 30 days prior to the proposed effective date. Section 35.2, 35.3 and 35.13 (a), Regulations under the Federal Power Act.

As set forth in *Municipal Light Boards* v. *FPC, supra* at 1354, the 60 day regulation is reasonable and is "designed to enhance the ability of the FPC Staff to make the important threshold decision expeditiously upon the filing of the later statutory 30-day notice, as to whether to order an investigation and hearing or a suspension, or both."

Moreover, I&M's reading of Section 205(d) of the Federal Power Act gives the same meaning to two separate sentences of that section, by asserting that both provisions permit the Commission only to fix a shorter notice period. Section 205(d) reads as follows:

> Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates,

> charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

In order to give meaning to all parts of the Section, since the last sentence gives the Commission power to permit less than 30 days notice, the provision in the first sentence properly should be interpreted to permit the Commission in appropriate circumstances to require the filing of requisite data more than 30 days prior to the proposed effective date.

If the Commission has authority to require filing of certain data 60 days prior to the proposed effective date, a suspension of the increased rates for five months thereafter is obviously consistent with Section 205(e) of the Federal Power Act.

In arguing that no regulatory or administrative consideration justifies denial of its request, I&M proposes that rate increase filings be permitted 30 days before the proposed effective date and that any suspension order be issued up to 60 days after the filing date with the suspension period running from the proposed effective date. This proposal is unworkable because the Commission does not have statutory authority to issue a suspension order after

a proper proposed effective date. I&M's proposed effective date of July 14, 1972, was improper because it was not 60 days after the filing date of June 13, 1972, and adequate review of I&M's filing by the staff necessitated the full 60-day period.

On September 25, 1972, a "Supplement to Petition of the City of Fort Wayne, Indiana, For Leave to Intervene" was filed. This supplementary petition alleges that I&M is engaged in anti-competitive practices and violations of antitrust laws and specifically that I&M's proposed increased rates have these effects because I&M's retail rates in the vicinity of Fort Wayne are lower. Fort Wayne requests that I&M's filing applicable to it be rejected. On October 3, 1972, I&M filed a motion for the Commission to reject or refuse to permit Fort Wayne's supplementary petition. Fort Wayne's pleading is actually in the nature of a motion, and we find that it does not state good cause for rejection of I&M's rate filing. We will deny the relief requested by Fort Wayne and I&M's motion.

The Commission further finds:

The grounds for rehearing set forth in the foregoing applications for rehearing present no new facts or principles of law which were not considered in our order of August 11, 1972, or which having now been considered warrant any change or modification of that order.

The Commission orders:

(A) The applications for rehearing filed herein and request for oral argument are denied.

(B) I&M's motion to reject Fort Wayne's "Supplement to Petition for Leave to Intervene" is denied.

(C) Fort Wayne's request that I&M's rate increase filing be rejected is denied.

By the Commission. COMMISSIONER MOODY DISSENTING FILED A SEPARATE STATEMENT APPENDED HERETO.

(SEAL)

KENNETH F. PLUMB,
Secretary.

INDIANA & MICHIGAN ELECTRIC COMPANY
Docket No. E-7740
(Issued October 6, 1972)

MOODY, Commissioner, Dissenting:

On June 13, 1972, Indiana & Michigan Electric Company (I & M) filed proposed rates increasing charges to its wholesale customers. I & M requested an effective date of July 14, 1972, and was advised by our Secretary that pursuant to the 60-day notice provision of Section 35.13(b)(4)(i) of the Regulations, the earliest possible effective date of the proposed rates was August 13, 1972. In response, I & M filed an application requesting either (i) an effective day of July 14, 1972, or (ii) that July 14, 1972, be set as the date from which any suspension of I & M's proposed rates would commence. On August 11, 1972, twenty-eight days after I & M's proposed effective date, the Commission issued an order suspending I & M's proposed rates for five months, with the suspension period commencing on August 13, 1972. In my opinion, that order when issued was, and continues to be, a nullity.

Once proposed rates have become effective this Commission is powerless to suspend the effectiveness of, or otherwise modify, those rates under §205 of the Federal Power Act. Our only recourse is to institute a proceeding under §206(a) of the Act and after hearing determine just and reasonable rates to be thereafter observed and in force. For the reasons set forth below, I believe that:

(i) I & M's proposed rates became effective on July 13, 1972;

(ii) I & M in its application for rehearing provided us with the opportunity to avoid litigating this case while at the same time completely protecting the rights of its customers; and

(iii) The effect of the rejection of that opportunity by my colleagues will ultimately result in the sacrifice of customers' rights at customers' expense for the sake of what I conceive to be an illegal regulation.

My colleagues argue that the §35.13(b)(4)(i) of the Regulations is valid, that it has been reviewed and accepted with apparent approval in *Municipal Light Boards* v. *F.P.C.*, 450 F.2d 1341, 1354 (CADC 1971), cert. denied, 405 U.S. 989 (1972), and further that the interpretation placed by I & M upon §205(d) of the Act renders parts of the Act meaningless. I disagree on both counts.

In *Municipal Light Boards* v. *F.P.C.*, the issue presented to the court was whether the Commission could waive its regulations and permit rates to become effective on less than the required sixty-days notice. No party to the case took issue with the legality of the sixty-day rule, but rather assumed the validity of the rule and addressed their arguments to the question whether or not the question whether [*sic*] the Commission could validly waive its provisions. In this context, Judge Levanthal observed (at 1354) with respect to the sixty-day rule that it is "designed to enhance the ability of the FPC Staff to make the important threshold decision expeditiously upon the filing of the later statutory 30-day notice, as to whether to order an investigation and hearing or a suspension, or both." In my view, the quoted language from *Municipal Light Boards* is not authority for validity of the sixty-day regulation and uttered as it was in the context of an assumption of the

validity of the rule does not even rise to the dignity of dicta on the issue before us.

On the second point (for the sake of brevity I will not again reproduce the language of §205(d) of the Act), I agree with the conclusion of my colleagues that "the provisions in the first sentence properly should be interpreted to permit the Commission in appropriate circumstances to require the filing of requisite data more than 30 days prior to the proposed effective date." However, the reasoning by which one is forced from this conclusion to the companion conclusion (that I & M's construction of §205(d) of the Act gives the same meaning to two separate sentences of that section), is labored. The Commission may, under appropriate circumstances, require a notice period of more than thirty days. Two illustrations from our regulation of the interstate gas industry under identical provisions of the Natural Gas Act come to mind.

First, where there is a *quid pro quo* with the option left to the applicant to choose a 30-day notice period or a longer period with some added benefit to the applicant, there is no prohibition against the longer notice period. For example, our Regulations under the Natural Gas Act provide in pertinent part—

> §154.22 Notice requirement. All tariffs, and contracts or any parts thereof shall be filed with the Commission and posted not less than thirty days nor more than sixty days prior to the proposed effective date thereof. . . .
>
> And §154.63(c) (4). . . . *Provided, however,* that if the proposed rate increase is filed at least 45 days before the effective date proposed therefor and such filing does not comply with the requirements of this

> section, the natural gas company will be notified of the deficiencies, and if such deficiencies are properly cured within 15 days from the date of such notice, the requisite supplementary material will be deemed to have been filed as of the same date as the initial submittal of the proposed rate increase.

Under this latter provision, the applicant may (and usually does) trade 15 days of additional notice for the opportunity to avoid rejection of its filing for noncompliance with our regulations.

A second illustration of where more than 30 days notice may be imposed is where there is no conflict with a suspension period. Where suspension, if any, and the requisite notice will not prevent the placing of proposed rates into effect for a combined period of not more than six months, the provisions of the Federal Power Act and the Natural Gas Act are satisfied. Although the legislative histories of both Acts are inconclusive on the issue, a report accompanying an amendment to the Natural Gas Act in 1961 read:

> The Commission, with respect to domestic users of natural gas, may suspend the effective date of a new rate filing up to a period of five months, which, together with the 30-day notice period, means a 6-month suspension.

Futhermore, of the analagous section in the Natural Gas Act, the Supreme Court has said:

> It may readily be seen that these requirements [§§4(c) and (d) of the Natural Gas Act]are no more than are necessary to implement §§4(e) and 5(a): the filing requirements are obviously necessary to permit the Commission to exercise its review functions, and the requirement of 30-days advance notice of changes

is essential to afford the Commission a reasonable period in which to determine whether to exercise its suspension powers under §4(e).

It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake. . . . This concern was surely a proper one for Congress to take into account in framing its regulatory scheme for the natural gas industry. . . . , and we think that it do [*sic*] so. . . . by providing in §4 for the earliest effectuation of contractually authorized or otherwise permissible rate review. . . . *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103,113-14 (1958).

The Court implied that the 30-day statutory period is to be used for the Commission review of rate filings and that a longer period would be incompatible with the filing utility's interest in the "earliest effectuation" of rate changes.

For the foregoing reasons, I dissent.

Rush Moody, Jr.,
Commissioner

Text of Statutes Relied On

Federal Power Act §205

Federal Power Act §205, 16 U.S.C. §824d:

"Section 824d. Rates and charges; schedules; suspension of new rates

"(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a

proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

Federal Power Act §206(a)

Federal Power Act §206(a); 16 U.S.C. 824e(a):

"Section 824e(a). Power of Commission to fix rates and charges; determination of cost of production or transmission

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any trans-

mission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

Federal Power Act §313

Federal Power Act §313; 16 U.S.C. 825*l*:

"Section 825*l*. Rehearings; court review of orders

"(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such man-

ner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

"(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings be-

fore the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

"(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."